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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1095

MARION G. DENTON,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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OPINION BELOW

The opinion of the United States Court of Claims, dated April 17, 1974, is officially reported at 204 Ct. Cl. 188, and is set forth in Appendix A.

JURISDICTION

The judgment of the court below was entered on April 17, 1974. Timely motion for rehearing was filed, and de-

nied on October 4, 1974. The Chief justice extended the time for filing petition for writ of certiorari to and including March 3, 1975. Jurisdiction to review this judgment is conferred on this Court by Title 28, Section 1255(1), of the United States Code.

QUESTIONS PRESENTED

1. Where a suit is begun in the United States Court of Claims based upon the failure of a military correction board to grant full relief under the statute requiring it to do so, can the court in applying the statute of limitations begin the running of the statute from the date of a decision of the board on a previous application, particularly when the board itself denominates its decision as being on reconsideration?

2. Can a military correction board, on a finding that a serviceman was improperly court-martialed, sentenced and discharged, order the issuance of a new discharge to be pre-dated to a date eighteen years previous to the date of the board's decision?

STATEMENT OF THE CASE

Petitioner, a major in the United States Air Corps Reserve, was ordered to active duty in 1941, and after a period of service in the Continental United States, received a Presidential Order ordering him to be assigned as Post Commander of the Greenland Base Command, and upon arrival there to assume command. Thereupon, he traveled to Greenland and reported to the officer then in command, who requested that he remain there pending clarification, and thereafter without advance notice ordered petitioner to one of the outlying stations of the Greenland Command. Petitioner protested that this was not in accord-

ance with his orders, which were to take command of the Greenland Command, and thereupon the Post Commander preferred charges against petitioner for violation of the 64th Article of War – willful disobedience of an order of a superior officer – and placed petitioner under arrest. Petitioner was court-martialed, convicted, and sentenced to dismissal, forfeiture of pay and allowances, and confinement to hard labor for twelve years. The sentence was approved by the convening authority, but the President of the United States remitted the forfeiture and confinement.

An investigation was made by the House Committee on Military Affairs, which concluded that a miscarriage of justice had occurred, and recommended that the verdict and sentence of the court-martial be disapproved and petitioner be restored to his former status. On September 24, 1953 petitioner applied to the Air Force Board for Correction of Military Records for the facation of the findings and sentence of his court-martial. This was denied. In 1973 another application was made, requesting the same relief, and after a hearing granted by the Board, a recommendation was made and approved by the Assistant Secretary of the Air Force, on March 19, 1964, that the findings and sentence be set aside, and all rights, privileges and property of which petitioner was deprived by virtue thereof be restored, that petitioner's military record be corrected to show his release from active duty on September 2, 1945, and that all appropriate and necessary action be taken in consonance with that directive.

In 1965 petitioner made a further application for correction of his military record, requesting that the previous order be amended to provide specifically for service beyond September 2, 1945, and for promotions thereafter. Following a hearing, the Board recommended, and

the Undersecretary of the Air Force directed on October 4, 1966, that petitioner's military record be corrected to show that he was not released from active duty on September 2, 1945, and instead that he was placed on ninety days' terminal leave effective that date, that he was promoted to lieutenant colonel effective November 1, 1945, and reverted to inactive status on December 2, 1945, appointed colonel in April 1953, and was retired in that grade on November 30, 1956 with entitlement to retired pay. Petitioner received payment based upon such correction on April 25, 1957 and thereafter based upon his retired status. On October 24, 1966, he was tendered a reserve appointment in the Air Force.

On August 17, 1972, petitioner filed a petition in the court below seeking judgment for back pay, allowances and other emoluments as a major in the Air Force Reserve from September 2, 1945 to March 19, 1964, and retirement pay and emoluments as a retired colonel in the Air Force Reserve since March 19, 1964, on the ground that the decision of the Undersecretary of the Air Force dated October 4, 1966, was arbitrary and illegal, and that neither the Correction Board nor the Secretary had the power to back-date an officer's release from active duty. The Government filed a motion for summary judgment, which the court granted on the ground that petitioner's claim was barred by the statute of limitations. The court indicated further that petitioner could not claim that the Correction Board acted arbitrarily by back-dating his discharge.

REASONS FOR GRANTING THE WRIT

The first issue sought to be raised by this petition is whether, by filing more than one application for correc-

tion of his military record, a serviceman is subject for purposes of seeking court review of the decision of a correction board to the running of the statute of limitations from the date of the decision of the board on his earlier application, although he later seeks additional relief which was not previously granted; and this irrespective of the date of the decision on the later application. This issue is important to the administration of federal law, in that it affects the availability of relief under the provisions of the Legislative Reorganization Act of 1946 establishing the correction board procedure in lieu of private relief legislation. The court below has established a precedent, unsupported by the statutory language, legislative history, or precedents in this Court, restricting and in some cases even eliminating the possibility of servicemen's obtaining the judicial review of the correction boards' determinations which the law provides.

The consequences of the rule established by the court below can be judged to some extent by the fact that during the first five years of their operation, the military correction boards processed over 15,000 applications, acting favorably on approximately 1,400. Hearings on H.R. 1181, House Committee on Armed Services, 82nd Cong., 1st Sess., p. 446.

The opinion of the court below promulgates criteria for the application of the statute of limitations in correction board review cases which are extremely difficult to understand, and a layman who might find his right of review jeopardized would be unable without consulting trained counsel to know his rights. In something as basic as limitations, clarity is at least as important as correctness, and a reading of the opinion of the court below will servie to indicate theproblem created by the complexity of the court's analysis.

If such a complicated rule were made necessary by the language of the statute or the legislative history, perhaps it could be justified, but the court cites no statutory language or background to support its position. On the contrary, it is in direct contradiction to the clear Congressional intent to make the relief provisions as broad and nontechnical as possible, without limits as to the manner of the boards' consideration of applications or judicial review (10 U.S.C. § 1552, appended hereto as Appendix B).

This Court held early in its history that the statute of limitations is not to be automatically invoked, the position of the one attempting to plead it being important. *Scott v. Shreeve,* 12 Wheat. 605. It is not intended as a punishment, but to protect those who rely on rights. *McIver v. Ragan,* 2 Wheat. 25. It finds justification in necessity and convenience rather than logic, and represents expediency rather than principles, not being a "fundamental" or "natural" right, and being subject to a great deal of legislative control. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304. Its purpose is for the respose of society and in order to protect those who may eventually lose their means of defense. *United States v. Marion,* 404 U.S. 307. In contrast, where the objects of a law are beneficent, it should be liberally construed. *Metropolitan Railway Co. v. District of Columbia,* 312 U.S. 1, and this includes legislation as to which the bar of limitations is attempted to be applied. *United States v. St. Paul, M. & M. Railway Co.,* 247 U.S. 310.

The court below, in determining the date on which the statute of limitations began to run, selected the date of the previous 1963 decision of the Correction Board, granting relief to the petitioner including, in general terms, restoration of his rights. The court based this on two fac-

tors (1) petitioner's not having specifically sought monetary benefits in his earlier application (although the statute itself provides for such relief when the correction of record is made), and (2) the board's having incorrectly treated the second application as a reconsideration, considered by the court to have been ineffective in tolling the period of limitations.

It is established that the court below has jurisdiction to review determinations of military boards when incomplete relief is granted, so that the question is specifically the date of accrual of the cause of action in such cases, for purposes of applying the statute of limitations for bringing action in the court below. What the court below has done is to apply artifical reasoning to the application of the doctrine of limitations, not only lacking legislative support, but contrary to the philosophy of Congress as implemented by the boards themselves. In this case, for example, the Board denominated its consideration of petitioner's application the review of which is sought in this proceeding, and its decision thereon, as reconsideration. However, the court below did not consider the Board's position in this respect as binding or merited, or that estoppel or any other equitable consideration prevented the Goverment from taking a contrary position in this action.

The position of the petitioner is strengthened by the efforts by the Department of Defense to carry out this liberal attitude on limitations, as indicated in a series of communications received by the petitioner, copies of correspondence being appended hereto as Exhibits A, B, C and D, including a specific inquiry made by respondent. Reliance on such a position is a consideration which should be considered in determining the applicability of limitations.

It is also notable that as a result of the action of the Correction Board in granting partial relief, petitioner became entitled to the restoration of his commission, which was tendered to him on October 24, 1966, per Exhibits E and F appended hereto, so that a separate basis for relief is for pay following such restoration. Cf. 10 U.S.C. sections 804(c) and 875(c), set fotth in Appendix B hereto. Cf. *Pratt v. Pratt,* 96 U.S. 704, where the Court held that laches could not be interposed where no cause of action yet existed.

As to the second issue, the propriety of pre-dating releases from duty, the court below has established the doctrine that if a serviceman is found to have been discharged or released through an illegal action, he is considered as continuing on duty for pay purposes as well as promotions. *Egan v. United States,* 141 Ct. Cl. 1. Still the military services have adopted the practice in such cases of issuing new discharges pre-dated to much earlier dates as they have done in the present case. The effect is to deprive the person injured by reason of the invalid action of benefits which would have accrued to him during the period between such action and the determination of its invalidity, despite the principle that a man is to be treated under such circumstances as if the invalid action had never taken place.

In the present case, although the petitioner was found in 1963 to be entitled to have his court-martial set aside, his release from active duty was dated 1945, so that the benefits of his active duty status, which would of course be reduced by his actual earnings for the period between 1945 and 1963 were denied him. Although the court below speculated that he would have been released at an earlier date, the fact that he could have very well remained

on active duty was nowhere mentiond by the court. Both the court below and other federal courts have held that an improperly released serviceman is entitled to the pay he would have received except for the release. The position of the court below in this case is inconsistent with those holdings, and has the effect of depriving servicemen in the position of the petitioner of valuable property rights to which they are legally and justly entitled.

CONCLUSION

In light of the statutory language and purpose, as carried out by the Department of Defense generally and in this particular case, the imposition of the bar of the statute of limitations in cases involving successive applications for relief to military correction boards is inconsistent with the entire background of the establishment of the correction boards, and the prior holdings of this Court. It serves to discourage administrative adjudications for the purpose of securing the complete relief specifically provided by Congress, and requiring resort to court action irrespective of the reconsideration available before the boards. It confuses and complicates what was intended to be a simplified procedure, and to require the utilization of judicial procedures, with the accompanying requirements of legal assistance, in what are essentially administrative matters, and establishes a rule which is beyond the comprehension of the layman. Before permitting such a rule to become law, this Court should take this opportunity to review the basis for the resulting departure from existing principles. Further, the propriety of back-dating of military

personnel actions based upon the determination of invalidity of discharges and releases should be considered. This case presents an ideal opportunity for such review.

Respectfully submitted,

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APPENDIX A

In the United States Court of Claims

No. 319-72

(Decided April 17, 1974)

MARION G. DENTON v. THE UNITED STATES

Alan Woods, attorney of record for plaintiff. *William R. Baesman* and *Rodden and Woods*, of counsel.

Rose E. Adewale-Mendes with whom was *Acting Assistant Attorney General Irving Jaffee*, for defendant.

Before DAVIS, SKELTON, and NICHOLS, *Judges*.

ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANT'S CROSS MOTION FOR SUMMARY JUDGMENT

SKELTON, *Judge*, delivered the opinion of the court:

On August 19, 1944, the plaintiff, Marion G. Denton, while holding the rank of major, was released from active duty and dismissed as an officer in the United States Army Air Corps Reserve, pursuant to a general court-martial. Nine years later, on September 24, 1953, he applied to the Board for Correction of Military Records for a correction of his military record. Item seven of the plaintiff's application contained his complete request for relief, and read in full as follows:

> 7. I request the following correction of record (State the exact record for which a correction is requested and in what particular)
>
> Vacation of findings and sentence of general court martial convened at Mitchell Field, New York, 27 September 1943, pursuant to Special Orders 234, 24 Au-

gust 1943, and 266, 25 September 1943, Headquarters First Air Force.

The Correction Board denied the application.

In 1963, the plaintiff again requested the Air Force Board for the Correction of Military Records to correct his military records. The application before the Correction Board in 1963, including the request for relief, was exactly the same as the application filed by the plaintiff in 1953, which is quoted above. The Board conducted a hearing on May 1, 1963. Thereafter, pursuant to recommendations by the Chairman of the Air Force Board for the Correction of Military Records, the Assistant Secretary of the Air Force, on March 19, 1964, directed that the findings and sentence of plaintiff's court-martial be "set aside so that all rights, privileges, and property of which said member [plaintiff] may have been deprived by virtue of the findings, sentence and execution thereof, be restored." He also directed that plaintiff's military records be corrected to show that the plaintiff was released from extended active duty *due to demobilization* effective September 2, 1945; and he ordered that all necessary and appropriate action be taken in consonance with his directive.

On November 30, 1965, the plaintiff again applied for correction of his military records. As may be seen below, this application requested relief that was new and different from that requested in 1953 and 1963. His 1965 application requested relief as follows:

> The order of the Board of 19 March 1964 providing that "* * * all rights, privileges, and property of which said member may have been deprived * * * be restored." be specifically amended to provide service beyond 2 Sept. 1945, and on determination of such date terminal promotion to Lieut. Colonel be provided, and to Colonel on 1 April 1953, and to Brigadier General on 30 November 1956.
>
> Pay
>
> 1. Active duty pay from 19 Aug 1944 to separation date.
> 2. Drill pay as Lieut. Colonel from separation date to 1 April 1953.
> 3. Drill pay of Colonel from 1 April 1953 (date all reserve officers were tendered new commissions) to 29 November 1956.

4. Accrued leave of 90 days on determined separation date.

Points

All points earnable for retirement from separation date to 29 November 1956.

* * * * *

It is important to note that the relief requested in this 1965 application was not requested in plaintiff's 1953 or 1963 applications *as it could have been.*

After a hearing, the Board recommended that corrections be made to the plaintiff's military records. On October 4, 1966, the Undersecretary of the Air Force directed that plaintiff's records be corrected as follows:

MEMORANDUM FOR THE CHIEF OF STAFF

Having received and approved the recommendations of the Air Force Board for the Correction of Military Records and under authority of Section 1552, Title 10, United States Code (70A Stat. 116), it is directed that:

1. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was not released from extended active duty on 2 September 1945.
2. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was authorized and placed on 90 days terminal leave effective 2 September 1945.
3. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was eligible for promotion under the terminal leave promotion policies in effect and promoted to grade of Lt. Colonel, Air Reserve, Officer Reserve Corps, effective 1 November 1945.
4. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was relieved from extended active duty due to demobilization, effective 2 September 1945 and reverted to inactive status on 2 December 1945.
5. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he was promoted

to grade of Colonel, Reserve of the Air Force, effective 31 March 1953.

6. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150432, be corrected to show that he was tendered an indefinite term appointment as Colonel, Reserve of the Air Force on 1 April 1953, and that he accepted the appointment on the same date.
7. The pertinent military records of the Department of the Air Force, relating to MARION G. DENTON, 0–150 432, be corrected to show that he accrued 35 Inactive duty points and 15 Gratuitous points for a total of 50 points during each of the following periods; and that each period is a satisfactory year of Federal service for retirement purposes:

   1 July 1949 to 30 June 1950
   1 July 1950 to 30 June 1951
   1 July 1951 to 30 June 1952
   1 July 1952 to 30 June 1953
   1 July 1953 to 30 June 1954
   1 July 1954 to 30 June 1955
   1 July 1955 to 30 June 1956

8. Upon submission of an appropriate application, the pertinent military records of the Department of the Air Force relating to MARION G. DENTON, 0–150 432, be corrected to show that he retired in grade of Colonel, Reserve of the Air Force, under the provisions of Section 1331, Title 10, USC, on 30 November 1956, with entitlement to retired pay effective 1 December 1956.
9. All necessary and appropriate action be taken in consonance with this Directive.

On April 25, 1967, the plaintiff received $42,511.57 as payment for sums due him as a result of the corrections to his records. Since October 1966, he has been receiving monthly retirement checks.

On August 17, 1972, the plaintiff filed a petition in this court seeking a judgment against the United States for the following: (1) back pay, allowances, and all other emoluments of a major in the United States Air Force Reserve on active duty from September 2, 1945, to March 19, 1964; (2) back retirement pay and all other emoluments due a retired colonel in the United States Air Force Reserve from March 19, 1964, to the date of judgment; and (3) an order to the defendant to pay plaintiff as a retired colonel in the

United States Air Force Reserve. The case comes to us on cross motions for summary judgment, and is ready for disposition on those facts which are undisputed.

The plaintiff contends that the October 4, 1966, decision by the Undersecretary of the Air Force was arbitrary and contrary to law. He argues that neither the Correction Board nor the Secretary of the Air Force has the power to backdate a reserve officer's release from active duty. Therefore, he asserts that as a matter of law he remained on active duty from the date of his wrongful discharge until March 19, 1964, when he was discharged by corrective action. Alternatively, the plaintiff contends that even if power exists to take corrective action by backdating a release, the use of such power in this case constitutes an arbitrary and capricious abuse of discretion.

The defendant asserts that the plaintiff's cause of action is barred by the statute of limitations. It also contends that the plaintiff's failure to present his claim before the Correction Board bars his action in this court. Alternatively, the defendant maintains that the Air Force Board acted within its power and discretion in backdating the plaintiff's release from active duty.

The statute of limitations, 28 U.S.C. § 2501 (1970), bars any claim "unless the petition thereon is filed within six years after such claim first accrues." In *DeBow* v. *United States*, 193 Ct. Cl. 499, 503, 434 F. 2d 1333, 1335 (1970), *cert. denied*, 404 U.S. 846 (1971), we reaffirmed our earlier holdings "that a claimant can often found a new cause of action, or a 'continuing' claim, upon a [first] favorable determination by the Correction Board (or comparable military tribunal) where that determination stops short of giving the full relief it was compelled in law to grant *on the presentation then made*." [Emphasis supplied.] The instant case involves two Correction Board determinations which were favorable, in the sense that some relief was granted to the plaintiff in both Board decisions. The Assistant Secretary of the Air Force acted on the first favorable determination on March 19, 1964, more than six years before August 17, 1972, the date on which the plaintiff filed a petition in this court. So, the first issue in this case is whether or not the plaintiff

can successfully claim that his cause of action arose on October 4, 1966, the date on which the Undersecretary of the Air Force acted on the *second* favorable determination. If not, his claim is barred by limitations.

We held in *DeBow* that a major reason for allowing a cause of action to be based on an initial favorable administrative determination, that would otherwise be barred by limitations, is that once an administrative body decides relief is proper on the claim and presentation then made, it should not be free to illegally or arbitrarily award less relief than that requested by the claimant in that proceeding. In the context of the correction of a military record, this means that once a discretionary decision is made to correct a record, the grant of appropriate money relief is not discretionary but automatic. *Ray* v. *United States*, 197 Ct. Cl. 1, 453 F. 2d 754 (1972). If appropriate payment is not then made, a cause of action accrues in this court at that time. *Ray*, *supra*. In this case, however, the appropriate payment has been made and plaintiff seeks only a new discretionary correction of his record. In these circumstances, the 1966 record correction is a nullity so far as concerns the accrual of a cause of action and whatever cause plaintiff has accrued in 1964 or earlier, and is now time barred.

The plaintiff contends that we should not consider the 1964 decision by the Correction Board final for the purposes of the statute of limitations because the 1965–1966 proceedings involved a reopening of the 1964 decision. This court has held that an administrative body's reopening of an earlier decision may, under certain circumstances, deprive that decision of finality for limitations purposes until a subsequent decision is reached. *Schiffman* v. *United States*, 162 Ct. Cl. 646, 319 F. 2d 886 (1963); *Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F. 2d 381 (1962) *cert denied*, 373 U.S. 932 (1963); *Capps* v. *United States*, 133 Ct. Cl. 811, 137 F. Supp. 721 (1956). However, in *Robinson* v. *United States*, 163 Ct. Cl. 235, 237 (1963), we further explained those cases by saying "[t]he 'reopening' to which *Friedman* refers (see p. 16, 310 F. 2d at 391) is of the kind which was present in *Capps* v. *United States*, * * * and *Schiffman* v. *United States*, * * *—where the service itself moved to accord the

plaintiff a new hearing on the basis of a new regulation or interpretation of the law." Under this approach, the fact that the parties and Correction Board call the new proceedings a "reopening," as they did in the instant case, has no effect on whether or not the proceedings are the type of reopening which tolls the running of limitations. In the case at bar, rather than the Air Force moving to accord the plaintiff a new hearing, the plaintiff himself requested new proceedings. Additionally, there was no change in regulations or interpretation of the law between the 1964 decision and the request for new proceedings in 1965. Therfore, the 1964 decision was not "reopened" by the later proceedings in any manner that affects the running of the limitations period.

We know of no reason why the 1965–1966 proceedings involved in the instant case should be held to bar the 1964 decision of finality. In 1964, the plaintiff received all the relief he had requested in his application to the Correction Board. He requested no more than a vacation of the findings and sentence of his general court-martial of 1943, and that is exactly what he received. None of the relief requested by the plaintiff's 1965 application to the Correction Board was requested, as it could have been, in his 1963 application. We see no reason why proceedings initiated by an application for entirely new relief, which could have been requested prior to an earlier favorable decision, should deprive the earlier decision, which granted all the relief requested, of finality. Therefore, the 1964 decision was final for the purpose of beginning the limitations period.

The plaintiff's 1965 claim before the Correction Board grew out of the same transaction or occurrence, the findings and sentence of the general court-martial of 1943, as his 1963 claim. Additionally, all the relief requested by the plaintiff in 1965 could have been requested in 1963. In other words, during the time between the two applications, no change occurred in the facts, or law, which was relevant to the plaintiff's right to recover. Therefore, as the discussion above indicates, the 1966 favorable decision by the Correction Board and the Undersecretary did not affect the running of the limitations period which began with the 1964 favorable determination. Since the plaintiff filed his petition in this court

more than six years after the 1964 decision, his claim is barred by our statute of limitations.

Even if the plaintiff could base his cause of action on the 1966 decision by convincingly arguing that the 1964 decision was not final, which he cannot, he still could not prevail. When the plaintiff filed his application with the Correction Board in 1965, he did not request either a discharge as of March 19, 1964, or active duty pay for the period from September 2, 1945, until March 19, 1964, both of which he is claiming in the instant suit. His active duty pay claim before the Board in 1965 covered only the period from August 19, 1944, until his separation date. Since he requested drill pay from his separation date until April 1, 1953, his application indicates that at most he claimed that his separation date should be after September 2, 1945, and sometime before April 1, 1953; and that he should receive active duty pay for the period ending on such separation date. The plaintiff does not contend that at any time during the 1965–1966 proceedings he attempted to extend his claim beyond what he indicated in his application. As can be seen, the claim he asserted during the 1965–1966 proceedings was very different from his claim here that the Correction Board's lack of power to backdate his discharge entitles him to active duty pay for the period from September 2, 1945, until March 19, 1964.

Although a claimant may be able to base a cause of action upon a Correction Board's favorable determination, this court plainly held in *DeBow* that a plaintiff may not use a "beneficial administrative determination as a springboard to obtain relief (within the Board's jurisdiction) which he disowned before the Board itself, or never sought from it, explicitly or implicitly." [193 Ct. Cl. at 503, 434 F. 2d at 1335.] In *DeBow*, we dismissed the plaintiff's petition because he asked for relief which he had not sought before the Correction Board. The only events, other than the Correction Board action, on which he could base his claim were barred by the statute of limitations.

We believe the *DeBow* holding applies to the instant case. As we indicated in *DeBow*, a favorable Board determination can be used as the basis for a cause of action only when the claimant's contentions before the Correction Board should

have put the Board on notice as to the nature of the claim later asserted in this court. A claimant should not be allowed to avoid the usual limitations bar by contending that a Correction Board acted arbitrarily or illegally by failing to approve a claim of which the Correction Board never had notice. In the case at bar, the plaintiff failed to put the Correction Board on notice as to the nature of the claim he now asserts in this court. This failure is shown above by the considerable difference between the relief sought in the plaintiff's 1965 application to the Correction Board and the relief sought in the plaintiff's petition in this court. Therefore, the plaintiff may not base his cause of action on the 1966 decision by the Correction Board and the Undersecretary of the Air Force. Since all events on which the plaintiff could possibly base his cause of action occurred more than six years before he filed his suit in this court, and since he claims relief here he never claimed before the Board, he has no basis for a cause of action in this court.

Even if we assume arguendo that the plaintiff put the Correction Board on notice as to the nature of his claim in this court, and that he can escape the limitations bar, he still cannot prevail. 10 U.S.C. § 1552 (1970)[1] grants to the Secretary, acting through the Correction Board, the power to correct records when a correction is necessary to rectify an error or remove an injustice. In *Kimmel* v. *United States*, 196 Ct. Cl. 579 (1971), this court held that section 1552 entitles a complainant to nothing more than placement in the same position he would have been had no error been made. The plaintiff in the instant case has indicated no purpose of the statute, and we know of no purpose, that would be better served if the Correction Boards were required to grant more relief than that stated in *Kimmel*.

The task of removing the injustice of an improper discharge or release can best be accomplished, and the purpose of the statute best effectuated, if the Correction Boards

[1] 10 U.S.C. § 1552 (1970) reads in pertinent part as follows:
"§ 1552. Correction of military records: claims incident thereto.
"(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. * * *"

(more correctly, the Secretaries acting through the Correction Boards) have considerable discretion to apply their expertise to the varying situations they confront. Many factors, such as the needs of the armed services and the characteristics of the particular individual involved, can affect the date on which a serviceman would have been discharged had an improper discharge never occurred. In a case such as the one at bar where the original discharge is not invalidated until many years after it occurred, such factors certainly might indicate that the complainant would have been discharged prior to the invalidation date. Therefore, we think the discretionary power granted to the Correction Boards by section 1552 includes the power to backdate discharges where such backdating places the claimant where he likely would have been absent the improper discharge. In fact, this court has previously approved the backdating of discharges and releases by Correction Boards. *O'Callahan* v. *United States*, 196 Ct. Cl. 556, 451 F. 2d 1390 (1971); *Mercercau* v. *United States*, 155 Ct. Cl. 157 (1961).

In several previous cases involving officers in the armed forces, this court held that Correction Boards acted improperly by backdating discharges. *Hamlin* v. *United States*, 183 Ct. Cl. 137, 391 F. 2d 941 (1968); *Motto* v. *United States*, 172 Ct. Cl. 192, 348 F. 2d 523 (1965); *Egan* v. *United States*, 141 Ct. Cl. 1, 158 F. Supp. 377 (1958). The plaintiff contends that these cases support his position in the instant case. However, all of these cases are decisively distinguishable from the case at bar.

All of these cases except *Egan* involved regular officers in the armed forces. Regular officers possess indefinite commissions, and, therefore, their status in the armed forces is different from the status of other personnel. *O'Callahan* v. *United States*, 196 Ct. Cl. at 560, 451 F. 2d at 1392, and cases cited therein. Reserve officers do not possess indefinite commissions. With exceptions not relevant to the instant case, reserve officers, such as the plaintiff, can be released from active duty at any time under 10 U.S.C. § 681(a) (1970).[2] We know of nothing which indicates that the status

[2] 10 U.S.C. § 681(a) (1970) provides in pertinent part as follows:
"§ 681. Reserves: release from active duty.
"(a) Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty."

of reserve officers was any different on the date to which the plaintiff's release was backdated. So, while regular officers may be able to successfully attack the backdating of a discharge as contrary to law, section 681(a) prevents reserve officers from succeeding in such a broad attack.

Even though *Egan* involved a reserve officer, this court has previously distinguished that case from cases such as the one at bar. In *Merriott* v. *United States*, 163 Ct. Cl. 261, 265 (1963), *cert. denied*, 379 U.S. 838 (1964), we stated as follows:

> * * * In *Egan*, the officer was illegally and erroneously released to inactive duty in October 1943, and then illegally discharged from the Marine Corps Reserve in April 1944, on the ground that he was insane (which he was not); if the true facts had been known it would have been highly unlikely that a healthy Marine Corps combat officer would have been released in the very midst of World War II; in fact, no reason for such a release at that time appeared in the record * * *.

Because the record in *Egan* indicated no reason or basis for backdating the release to the selected date, the Correction Board's action was found to be arbitrary and was not allowed to stand.

In the instant case, the Correction Board did not act arbitrarily in backdating plaintiff's release. The release was backdated to a date near the end of World War II, a time when many reserve officers were released from active duty because they were no longer needed. This court approved a similar release in *Merriott* where an Army Disability Review Board found that the plaintiff in that case had been improperly released from active duty on January 1, 1945, *by reason of physical disability*. Even though the Review Board reversed the earlier finding that the plaintiff in *Merriott* was incapacitated for active duty, it refused to grant any relief, and, therefore, left the plaintiff's release date at January 1, 1945. In refusing to find that the Review Board acted arbitrarily, we said that the plaintiff obtained a release which "came too close to the end of World War II for the court to speculate that, unlike millions of other reservists, he would have been kept on active duty." [163 Ct. Cl. at 264.] As

with the plaintiff in *Merriott*, the plaintiff in the instant case received a release as of a date reasonably related to the events surrounding that date. Therefore, he cannot successfully claim that the Correction Board acted arbitrarily by backdating his claim.

For the reasons stated above, the defendant's motion for summary judgment is granted, the plaintiff's motion for summary judgment is denied, and plaintiff's petition is dismissed.

APPENDIX B
STATUTORY APPENDIX

10 U.S.C. 804(c)

(c) If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

10 U.S.C. 875(c)

(c) If a previously executed sentence of dismissal is not imposed on a new trial, the Secretary concerned shall substitute therefor a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the President alone to such commissioned grade and with such rank as in the opinion of the President that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances. Aug. 10, 1956, c. 1041, 70A Stat. 63.

10 U.S.C. 1552

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection (a) unless the claimant or his heir or legal representative files a request therefor

before October 26, 1961, or within three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for payment is made by a legal representative, the money shall be paid—

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs.

(f) The Secretary of Defense for the military departments, and the Secretary of the Treasury for the Coast Guard, shall report to Congress every six months on claims paid under this section during

the period covered by the report. The report shall include for each claim the name of the claimant, a brief description of the claim, and a statement of the amount paid. Aug. 10, 1956, c. 1041, 70A Stat. 116.

28 U.S.C. 2501

Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

Every claim under section 1497 of this title shall be barred unless the petition thereon is filed within two years after the termination of the river and harbor improvements operations on which the claim is based.

A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

A suit for the fees of an officer of the United States shall not be filed until his account for such fees has been finally acted upon, unless the General Accounting Office fails to act within six months after receiving the account. June 25, 1948, c. 646, 62 Stat. 976; Sept. 3, 1954, c. 1263, § 52, 68 Stat. 1246.

EXHIBIT A

HEADQUARTERS
AIR RESERVE RECORDS CENTER
UNITED STATES AIR FORCE
3800 YORK STREET
DENVER, COLORADO 80205

REPLY TO ATTN OF: RPCS-321

1 AUG 1964

SUBJECT: DENTON, Marion G. AO 15 04 32, Retirement

TO: Mr. Marion G. Denton
205 Denton Avenue
Auburndale, Florida

1. The statute of limitations requires that a claim must be filed within 10 years from the first date eligibility was attained. You attained eligibility on 30 November 1956, the end of the month in which you reached age 60.

2. Since your records were corrected to show release from extended active duty effective 2 September 1945, your ORC commission remained in effect until 1 April 1953. Prior to 1 July 1949 a reservist is credited with one point for each day of active duty and 50 points for each 365 days not on active duty. After 1 July 1949 an individual is credited with actual points earned in addition to 15 gratuitous points awarded for reserve membership. You have been credited with 56 gratuitous points from 1 July 1949 - 1 April 1953.

3. The attached ARRC Form 33, Statement of Reserve Retirement Service and Point Credit, reflects points and service verified by documents in your master personnel record.

1 Atch
ARRC Form 33

ETHEL F. BOUCHIER, Chief
Retirements Unit I

ADDRESS CORRESPONDENCE TO "AIR RESERVE RECORDS CENTER" - NOT TO INDIVIDUALS
INCLUDE YOUR SERVICE NUMBER

EXHIBIT B

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS AIR FORCE ACCOUNTING AND FINANCE CENTER
[illegible]
DENVER [illegible] 80205

REPLY TO ATTN OF: AJC

9 Mar 1967

SUBJECT: Corrected Military Records - Colonel Marion [illegible] Denton, FV 150432, USAF (Retired)

TO: Mr. John J. Corcoran
The American Legion
1608 K Street NW
Wash, DC 20006

RECEIVED
MAR 10 1967
THE AMERICAN LEGION
[illegible]
DAYL OFFICE

1. Reference is made to your recent correspondence in regard to correction of Colonel Denton's military records.

2. You were right in your assumption that check dated 31 Jan 1967 in the amount of $286.91 payable to Colonel Denton was for retired pay due for the month of Jan 1967. The deduction of $177.29 from $886.45 shown on Voucher L-3963 is for withholding tax.

3. In accordance with Public Law 220-82 Congress as pertains to correction of military records, there is no 10 years statute of limitation in regard to payment for claims of this nature. Payment for the amount shown on attached copy of AFAFC Form 640-1 will be made in full to Colonel Denton when funds become available.

4. Funds for correction of records payments are allocated to the Air Force by the Department of Defense. We regret that funds for payment of claims of this nature are not available at present. You may be assured that when funds are made available to the Air Force, payment will be made immediately.

5. We forwarded a copy of AFAFC Form 640-1 to Colonel Denton on 27 Feb 1967.

DEAN P. ROBERTS, Major, USAF
Chief, Claims Division
Directorate of Adjudication

1 Atch
Cy AFAFC Form 640-1

EXHIBIT C

Marion Gray Denton
205 Denton Avenue
Auburndale, Florida
33823

May 5, 1971

Department of The Air Force
Headquarters Air Force Accounting
and Finance Center
3800 York Street
Denver, Colorado 80205

Attention: Claims Division
Directorate of Adjudication

Gentlemen:

The undersigned retiree invites attention to computation of benefits and allowances provided after restoration on 4 October 1958.

Essentially, factors involved are that compliance in keeping with communications dated 24 Oct 1958 AFPMSDC and USA PHPC (AFPMDC), Randolph Air Force Base, Texas 78148, was not provided. Copies of both communications are attached hereto.

Accordingly I wish to make claim and request recomputation and payment for "any pay and allowances which accrue to you for a period of one year from the date of such correction" as follows:

Promotion to Lt. Colonel from 1 November 1948 to 31 March 1953.

Promotion to Colonel on 31 March 1953 to 4 December 1967.

As will be seen determination outlined is in compliance with the period "one year from date of such correction".

It is recognized that from such settlement there will be deducted retired pay for an intervening period within that extending from entitlement thereto until the period involved has ceased.

As authority I wish to cite 10 U.S.C. 1552 indicating that I was and am entitled to full active duty pay and allowances to the grades provided by the action on 4 October 1966 and for one year thereafter.

Attached hereto also are photostatic excerpt copies of Uniform Code of Military Justice (P1.296 Pages 4 and 28), offered as legal precedent.

Should it be that this communication is not addressed to the authorized official, it is requested that referral be made thereto.

Marion G. Doston
Colonel USAF (Retired)
FV150432 (263485678)

MGDsw
encl. 4

EXHIBIT D

THE VICE PRESIDENT
WASHINGTON

September 9, 1965

Dear Gene:

It was nice to hear from you, and I am sorry that we did not see each other in Tampa.

My Military Aide has thoroughly investigated Marion Denton's case and has advised me that the best course of action for Mr. Denton is to reappeal to the Air Force Board for the Correction of Military Records, under Air Force Regulation 31-3, requesting that they reconsider their findings of March 1964 on the premise that but for the court-martial, Mr. Denton would have stayed in the military service beyond September 2, 1945, and would have been promoted with his contemporaries to the grade of lieutenant colonel, or that he would have stayed in the service until after the effective date of the terminal leave promotion program and would have been eligible on separation for promotion to the grade of lieutenant colonel, or in the alternative, would have stayed in the active Reserve of the Air Corps and would have achieved a promotion to Reserve lieutenant colonel along with his contemporaries. Further, that subsequently by Reserve participation, he would have competed with his contemporaries for and been promoted to the Reserve grade of colonel prior to his 60th birthday. Mr. Denton should therefore contend that the Board should retire him as a Reserve colonel retroactively. The only other alternative would be a private relief bill, which would have virtually no chance of enactment so long as he has not exhausted his appellate channels with the Board for the Correction of Military Records.

My Military Aide further advises me that Representative Olin Teague is actively and effectively pursuing Mr. Denton's case with the Air Force. Since the Congressman is doing such an excellent job, I feel that he should continue to be Mr. Denton's spokesman. I will advise Representative Teague of my interest in Mr. Denton's behalf.

With all best wishes.

Sincerely,

Hubert H.

Hubert H. Humphrey

Mr. Eugene A. Flint
415 East Canfield Street
Avon Park, Florida

EXHIBIT E

DEPARTMENT OF THE AIR FORCE
Headquarters United States Air Force
Randolph Air Force Base, Texas

REPLY TO
Attn Of AFPMRDC 24 Oct 1966

Subject: Appointment as a Reserve Officer of the Air Force

To: Colonel Marion Gray Denton, AO 150432, Retired Reserve
205 Denton Avenue
Auburndale, Florida 33823

1. The Secretary of the Air Force has directed me to inform you that, by direction of the President, you are tendered an indefinite term appointment as a Reserve officer of the Air Force. Grade and service number are shown in the address above. Appointment is effective on date of acceptance.

2. Request you execute and return the inclosed oath of office at once. This action constitutes acceptance of your appointment and no other evidence is required. If you are unable to accept this appointment, return this letter with your statement of declination. Failure to respond to this tender of appointment within a reasonable period of time will result in cancellation.

3. You will not perform the duties of an officer under this appointment until specifically ordered by competent authority.

4. Authority for this appointment is 10 USC 593, and 1552d.

HAROLD W. HOSACK
Lt. Colonel, USAF
Directorate of Personnel
Resources & Distribution

1 Atch
AF Form 133 w/envelope

EXHIBIT F

DEPARTMENT OF THE AIR FORCE
HEADQUARTERS UNITED STATES AIR FORCE
WASHINGTON, D.C.

REPLY TO ATTN OF: USAFMPC (AFPMRDS) RANDOLPH AFB TEXAS 78148

24 OCT 1966

SUBJECT: Correction of Records

TO: Colonel Marion Gray Denton, AO 150432, Retired Reserve
205 Denton Avenue
Auburndale, Florida 33823

1. Your military records are being corrected to reflect the changes enumerated in the 4 October 1966 directive of the Under Secretary of the Air Force. The corrective actions being taken will validate your status for any pay and allowances which accrue to you for a period of one year from the date of such correction. However, in order to validate your status for any pay and allowances which might accrue to you thereafter, the law requires that you be reappointed to the grade to which such payments relate.

2. Under the provisions of Section 1552d, Title 10, United States Code (70A Stat 116), you are tendered an appointment as Colonel, Reserve of the Air Force. This action is taken in anticipation of your submission of an application for retirement benefits in the Reserve grade of Colonel under the provisions of Section 1331, Title 10, United States Code, effective from 1 December 1956. It is an additional but a necessary part of the correction process to ensure your right to continuing payments beyond the one year covered by law.

3. Request the attached oath be properly executed and returned to this headquarters (AFPMRDS) as soon as possible.

4. If you have not already done so, it is suggested that you immediately submit the application forms for retirement benefits. These forms, furnished you in July 1964 by the Air Reserve Personnel Center (formerly the Air Reserve Records Center), Denver, Colorado, should be completed and forwarded to ARPC (RPCA-31), 3800 York Street, Denver, Colorado 80205.

FOR THE CHIEF OF STAFF

C. R. CARLSEN, Lt Colonel, USAF
Chief, Special Actions Branch
Directorate of Personnel Resources and Distribution

1 Atch
Appt Ltr w/Atch